11/Appeal Brief
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF APPEALS AND INTERFERENCES

In re Patent Application of:	Jean Michel Lerdu
Patent Application No.:	10/033,178
For:	FENCE
Filing Date:	28 December 2001
Art Unit:	3679
Examiner:	J. Schiffman

APPLICANT'S APPEAL BRIEF

REAL PARTY AND INTEREST

The real party in interest, as assignee and owner of the entire right, title and interest of the patent application, is Spartech Corporation, a corporation established under the laws of the State of Delaware and located at 120 S. Central Avenue in Clayton, Missouri.

RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the applicant or to the applicant's legal representative which will directly affect or be directly affected or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims 1-17 are currently pending. Claims 1-17 stand finally rejected.

STATUS OF AMENDMENTS

There have been no amendments filed subsequent to the final rejection.

SUMMARY OF THE INVENTION

The invention of the application under appeal relates to a fence generally of the type having spaced apart support posts, an upper rail and a lower rail extending between adjacent posts, and one or more generally vertical slats or boards extending between the rails. Upper rail 14 and lower rail 12 each extend between adjacent posts 18 with boards 20 extending between the upper and lower rails. (FIG. 1; p 3, ln 10-12) Each rail 12, 14 comprises two opposing half parts 22, 24. (FIG. 6; p 3, ln 14) The opposing half parts 22, 24 are substantially symmetrical or mirror images of each other except for the complimentary interconnecting fastener portions 26 (FIG. 6; p 3, ln 14-16). At least one half part 22 or 24 includes a plurality of longitudinally spaced apart ribs 34 that protrude transversely to the general longitudinal axis of the half part (FIG. 6; p 3, ln 18-20). When half parts 22, 24 are secured together with fastener portions 26, each adjacent pair of ribs 34 defines a space 40 between the adjacent ribs into which a board 20 is fitted (FIG. 6; p 4, ln 6-8).

In the preferred embodiment, each opposing half part 22, 24 includes ribs 34, which oppose each other. (FIG. 6; p 4, ln 7-8) The opposing ribs 34 define a spacer 41 that separates adjacent boards 20 (FIG. 6; p 4, ln 9-10). When opposing half parts 22, 24 are mated together, the intermediate flange 32 of lower rail 12 carries boards 20 (FIG. 10; p 4, ln 21-22), and the lower flange 36 of lower rail 12 carries posts 18 (FIG's. 7 & 8; p 4, ln 12-16). Fasteners 44 may be used to secure the posts 18 to the rails 22, 24. (p 4, ln 19-20)

In this manner, the invention provides a fence that may be easily assembled by assembling opposing half parts 22, 24 to form the top and bottom rails 12, 14, and fitting boards

20 into the spaces 40. Posts 18 may be fitted into the ends of rails 12, 14 and secured thereto with fasteners 40. Opposing half parts 22, 24 minimize the number of separate pieces needed to form the rails 12, 14.

ISSUES

Whether the Examiner erred in rejecting claims 1-17.

GROUPING OF CLAIMS

Claims 1-4, 6, 7, 12, and 13 may be considered together. Claims 5 and 10 may be considered together. Claims 14-17 may be considered together. Claims 8, 9, and 11 should be considered separately.

ARGUMENT

A. §102 rejections based on Tornya: Claims 1-3, 6, 12, and 13.

Claims 1-3, 6, 12, and 13 stand finally rejected as being anticipated by Tornya (US 4,346,872). The essence of the impasse between the Applicant and the Examiner regarding claims 1-3, 6, 12, and 13 is in the interpretation of the claim limitations, "half parts," and "at least one of said parts having longitudinally spaced ribs."

With regard to claim 1, Tornya does not disclose "at least one of said rails having separate half parts, . . . , at least one of said parts having longitudinally spaced ribs, each adjacent pair of ribs defining a space therebetween, and a said board fitted into a said space. . . ." In response to the Applicant's prior arguments to the same effect, the Examiner states that parts 3 (base) and 8 (spacer) of Tornya are "half parts" because, together, they make up a whole rail.

Applicant respectfully submits that this is not true because the base 3 and spacer 8 of Tornya are not of similar size or shape such that they are approximately equal in size or shape. It appears that Examiner has misunderstood both the usual and customary meaning of the word "half," and the meaning imparted to the word "half" from the specification. As defined in the specification, "except for the fasteners 26, . . . one half part 22 is essentially a mirror image of the other half part 24." (p 3, ln 14-16) As defined by *Webster's Third International Dictionary*, "half" has the ordinary meaning, " one of two equal parts into which a thing is divisible," or "a part of a thing approximately equal to the remainder." (pg 1021, Merriam-Webster 2002) The base 3 and spacers 8 of Tornya are not even close to being "essentially mirror images" of each other, or of being "approximately equal" to each other. The base 3 is a large C-shaped portion and the spacer 8 is a small covering that closes the open portion of the base 3. Furthermore, the base 3 is an extended length of railing and each spacer 8 is only supposed to be a short portion that does not match the length of the base 3. Nor would it be obvious to cause the base 3 and spacers 8 to be of nearly equal size since the spacers must be individually placed between the balusters 6. Therefore, Tornya does not disclose a rail having separate half parts.

The Examiner also dismissed Applicant's argument that the beads 14 of Tornya are not "longitudinally spaced." The Examiner disagreed because, "the ribs [i.e. beads] 14 extend outward from the bottom of rail part [i.e. base]8. . . ." How this corresponds to "longitudinally spaced" is unclear. As used in the specification and shown in the drawings of the Application, "longitudinally spaced ribs 34" are ribs that are spaced apart from each other along the length of the rail. (p 3, ln 19; FIG's 5, 6, and 10) As previously argued by Applicant, beads 14 in Tornya are not longitudinally spaced. Rather, beads 14 in Tornya are longitudinally extended along the length of the rail and transversely spaced from each other across the width of the rail.

Finally, even if the table portion 9 of the spacer 8 in Tornya were construed to correspond to the "longitudinally spaced ribs," Tornya does not disclose any more than one table portion 9 on each section of spacer 8. Neither would it be obvious to combine multiple spacers 8 so that a single spacer included multiple table portions 9 because, as already explained, Tornya can only work in its intended manner when there is a separate, individual spacer 8 inserted between each adjacent pair of balusters 6. Therefore, even when correctly interpreted, claim 1 is neither anticipated nor rendered obvious by Tornya because Tornya does not disclose all the elements of claim 1.

With regard to claim 2, the Examiner states that, "Tornya discloses both parts [base 3 and spacer 8] having longitudinally spaced ribs 4, 14, the ribs being opposed when the parts are secured together with each adjacent pair of opposed ribs defining a space therebetween." This analysis of Tornya is incorrect for the reason that neither the engaging elements (i.e. fasteners) 4 or the bead 14 are longitudinally spaced, as already explained. Further, the fasteners for joining parts 3 and 8 are parts 4, 10, not parts 17, 10. Therefore, claim 2 is neither anticipated nor rendered obvious by Tornya because Tornya does not disclose all the elements of claim 2.

With regard to claim 3, 6, 12, and 13, the same reasons already assigned for claim 1 apply equally to these claims. Further with regard to claim 6, part 17 does not serve to secure parts 3, 8 together

B. §103 rejections based on Tornya as modified by Weaver: claims 4 and 7-9.

Claims 4 and 7-9 stand finally rejected as being rendered obvious by Tornya as modified by Weaver (US 4,953,830). The Examiner argues that Tornya discloses all the elements of claims 4, and 7-9 except the second post and the third rail. The Examiner argues that it would

have been obvious in light of Weaver, which discloses a second post and a third rail, to duplicate the post and rails of Tornya in order to obtain the second post and third rail of the claims.

With regard to claims 4, and 7, the reasons already assigned for claim 1 apply equally to these claims. Tornya does not disclose rails having separate half parts and longitudinally spaced ribs in one of the half parts. Therefore, Tornya and Weaver do not render claims 4 and 7 obvious because they do not disclose all of the claim limitations.

With regard to claim 8, the Examiner's proposed combination is impermissible hindsight. Weaver does not disclose a third rail having separate half parts including cooperating fasteners for securing the half parts together. Nor would it have been obvious to duplicate the first two rails of Tornya to obtain a third such rail because the upper rail 1 and lower rail 2 of Tornya are clearly meant only to cap the opposite ends of the balusters 6. There would be no motivation -- and the Examiner has not pointed to any motivation -- to duplicate either of the two rails 1, 2 of Weaver as a third rail as recited in claim 8 because duplication of the two-part rails of Tornya would serve no function or purpose in a third rail. Therefore, claim 8 is not rendered obvious by Torny and Weaver because there would have been no motivation to combine the two references in the manner claimed.

With regard to claim 9, in addition to the reasons already given for claim 8, Weaver does not disclose a third rail with at least one of the half parts including longitudinally spaced ribs, each adjacent pair of rigs defining a space into which one of the boards is fitted. Nor would it have been obvious to duplicate either of the two part rails 1, 2 to obtain such a third rail, as argued by the Examiner, because mere duplication of either of the Tornya rails above the rail 1 would not provide the fence of claim 9. Specifically, a baluster 6 of Tornya can not extend through rail 1 so that it could also be fitted into a space in a duplicated third rail. Therefore,

mere duplication of the rails disclosed in Tornya would not render the third rail of claim 9 obvious.

C. §103 Rejections based on Tornya as modified by Weaver and Grimm: Claims 5, 10, and 11.

Claims 5, 10, and 11 stand finally rejected as being rendered obvious by Tornya as modified by Weaver and Grimm (US 4,421,302). Claims 5 and 10 focus on the inventive aspect in which the posts fit between the opposing half parts of the rails. Claim 11 focuses on the inventive aspect in which the lower rail also carries the post. The Examiner reasons that Grimm discloses a fence having posts "fitting between opposing half parts 25, 26 and 35, 36 of rails 24 and 34," and "the lower rail 34 carrying the post [i.e. newels] 14."

With respect to claims 5 and 10, neither Grimm nor any of the other references disclose posts that are fitted between the opposing half parts of each of the rails. The Examiner appears to have misunderstood the meaning of the claim limitation "each post fits between said parts of each of said rails." The Examiner points to sidewalls 25, 26 and 35, 36 of Grimm to support the rejection. However, newel 14 of Grimm is clearly not between opposing sidewalls 25, 26 or 35, 36 of rails 24 and 34. Rather, the opposing sidewalls 25, 26 and 35, 36 simply abut the side of the newel 14, as shown in FIG. 1. Alternatively, if the Examiner is considering the rails 34 abutting opposite sides of the newel 14 as disclosing this limitation, this interpretation of the claim would also be incorrect. Under that rationale, the newel 14 would be between different half parts of different rails, not the same half parts of the same rails as earlier referenced in the claims. Therefore, claims 5 and 10 are not anticipated or rendered obvious by Tornya, Weaver, and Grimm because these references fail to disclose all the limitations of these claims.

With respect to claim 11, as previously argued by the Applicant, Grim does not disclose a fence wherein the posts are carried by the lower rail. The Examiner has never responded to this argument. The Examiner interprets Grimm as disclosing the lower rail 34 carrying the newel 14. This is not supported by either the drawings or the specification of Grimm. Rather, the newel 14 rests directly upon and is carried by the floor as shown in FIG. 1. The lower rail 34 is fastened to the side of the newel 14 with screws 70 and the lower rail 34 is carried by the newel 14, as described in detail at col. 4, lines 45-60 and shown in FIG. 4. This is also indirectly demonstrated by the fact that in one described embodiment of Grimm, the lower rail is completely omitted, which shows that the lower rail is not used to carry the newels 14. (col. 5, ln 50-64) Therefore, in addition to the reasons already given for parent claim 1 and intermediate claim 10, claim 11 is not rendered obvious by Tornya in combination with Grimm and Weaver because these prior references fail to disclose all the limitations of claim 11.

D. §103 Rejections based on Michael as modified by Tornya: Claims 14-17

Claims 14-17 stand rejected as being rendered obvious by Michael (US 6,231,031) as modified by Tornya. The Examiner admits that Michael fails to disclose the complimentary fastener parts carried by each half part and the longitudinally spaced, transverse ribs. The Examiner finds these claim elements in Tornya. The Examiner's rejections of each of claims 14-17 are improper for the reason that, as already set forth in detail above, Tornya does not disclose one of the half parts having longitudinally spaced ribs that extend transversely between the half parts. Also, one can not incorporate a snap type fastener (claim 13) into the solid board design of Michael. Therefore, the Examiner's §103 obviousness rejections of claims 14-17 are improper because the cited contribution upon which the Examiner relies does not disclose all the claim limitations of any of the claims.

CONCLUSION

The invention claimed in claims 1-17 is not anticipated or rendered obvious by the cited art because the cited art fails to disclose each and every claim limitation. For these reasons, Applicant respectfully requests that the Board reverse the decision of the Examiner and hold that claims 1-17 are in a position for allowance as written.

Respectfully Submitted,

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APPENDIX: TEXT OF CLAIMS INVOLVED IN APPEAL

1. A fence comprising an upper horizontal rail, a lower horizontal rail, boards extending between said rails, at least one of said rails having a separate half parts, each of said parts including a cooperating fastener for securing the parts together about said boards, at least one of said parts having longitudinally spaced ribs, each adjacent pair of ribs defining a space therebetween, and a said board fitted into a said space with said parts secured together about said boards.

2. The fence of claim 1 wherein both of said parts have said longitudinally spaced ribs, said ribs being opposed when said parts are secured together with each adjacent pair of opposed ribs defining a said space therebetween.

3. The fence of claim 1 and a first vertical post extending transversely relative to said rails, said rails engaging said first post.

4. The fence of claim 3 and a second vertical post extending transversely relative to said rails, said rails engaging said second post.

5. The fence of claim 4 wherein each post fits between said parts of each of said rails.

6. The fence of claim 1 wherein both of said rails have said separate half parts, at least of one of said parts of each rail having said longitudinally spaced ribs.

7. The fence of claim 4 and a third horizontal rail located above said upper horizontal rail, each of said rails engaging said first and second vertical posts.

8. The fence of claim 7 wherein said third rail has separate half parts, each of said parts of said third rail including cooperating fasteners for securing the parts together.

9. The fence of claim 8 wherein at least one of said parts of said third rail includes longitudinally spaced ribs, each adjacent pair of ribs defining a space therebetween, a said board fitted into a said space defined between said ribs.

10. The fence of claim 4 wherein each post fits between said opposing half parts of each of said rails.

11. The fence of claim 10 wherein said lower rail carries said posts and said boards.

12. A fence comprising an upper horizontal rail, a lower horizontal rail, boards extending between said rails; at least one of said rails having a separate opposing half parts, each of said parts including a complimentary part of a cooperating fastener for securing the parts together about said boards, at least one of said parts having longitudinally spaced ribs, each adjacent pair of ribs defining a space therebetween, and a said board fitted into a said space with said parts secured together about said boards.

13. The fence of claim 12 wherein said complimentary parts of said fastener are slidingly engageable in one direction for mechanically preventing disengagement in the opposite direction.

14. The fence of claim 13 wherein said half parts vertically oppose each other, said fastener for securing the parts about opposite sides of said boards.

15. The fence of claim 14 wherein said ribs extend transversely between said parts.

16. The fence of claim 15 wherein said opposing parts and each adjacent pair of said ribs define said space.

17. A fence comprising an upper horizontal rail, a lower horizontal rail, and boards extending between said rails; one of said rails divided into two vertically opposing half parts;

each said part including a complimentary portion of a fastener for securing the parts together about opposite sides of said board; one of said parts including a plurality of longitudinally spaced, transverse ribs extending toward the other of the parts; said opposing parts and each adjacent pair of said ribs defining a space therebetween into which a said board is fitted when said parts are secured together about said opposite sides of the board.